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37729—10——1

In the Supreme Court of the United States.

October Term, 1909.

No. 183.

ROBERT A. HOOE AND ARTHUR HERBERT, APPELLANTS.

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a claim for $9,000 for additional compensation for occupation and use by the United States Civil Service Commission of the appellants' office building during the five years beginning August 1, 1900, and ending August 1, 1905. The occupation of the main part of the building was under formal contract of lease, but the occupation of the basement was outside of any lease or agreement of any kind between the parties.

Before proceeding further with the recital of the facts as to the occupation and use in question, we

wish to call attention to the important and controlling fact that the amount of rent which could be paid for quarters for the Civil Service Commission was specifically limited by law to the amounts of the annual appropriations for that purpose, and that the full amounts appropriated for the years covered in this suit were paid to the appellants as rent for their building.

For some time immediately prior to August 1, 1900, the Civil Service Commission had office quarters and was located in the building on the *southeast* corner of Eighth and E streets northwest, Washington, D. C., the Secretary of the Interior paying for such quarters the sum of $4,000 per year, which was the full amount appropriated by Congress for office quarters for the commission. On the 10th of July, 1900, the appellants leased and rented to the Secretary of the Interior, for the use of the Civil Service Commission, all of their said building and premises, excepting the basement thereof, together with all and singular the appurtenances thereunto belonging and appertaining, for the period commencing on the 1st day of August, 1900, and ending with the end of that fiscal year, June 30, 1901, at the rental rate of $333.33\frac{1}{3}$ per month, to be paid on the last day of each and every month, this being at a rental rate of $4,000 per year, as provided by the appropriation by Congress for quarters for the commission.

The appellants at the time of entering into said lease desired to rent the entire building to the Government, at a rental rate of $6,000; but in view of

Congress having appropriated only $4,000 for the rental of quarters for the commission, which it was provided should be in full for that purpose, and with the understanding that the officers of the Government would recommend that the amount of the appropriation and rental be increased to $6,000 per year for the *entire building*, they entered into the lease for that part of the building above the basement at a monthly rate equal to the $4,000 appropriated.

When the commission took possession under the lease on August 1, 1900, it occupied not only that part of the building covered by the lease, but also the basement of the building, and the entire building was occupied and used by the commission for the period of the five years in question, up to August 1, 1905.

This occupation and use of the basement of the building by the Civil Service Commission was wholly outside of any agreement between the officers of the Government and the appellants, and was not authorized or directed by the Secretary of the Interior, nor has any rent been paid therefor.

Claim is made by appellants for rent for this occupation and use of the basement, the claim being here based upon the provision of the fifth amendment of the Constitution, that private property shall not be taken for public use without just compensation.

As to that part of the building above the basement, a part of this five years' occupation and use of it was under formal written leases fixing the rate of rent to be paid at the rates provided and limited by law for rent

of quarters for the commission; and the remainder of the occupation was merely by holding over after the expiration of such written leases, during which rent was paid at the rate specified in the said leases for preceding years, which were also the rates provided and limited by law for quarters for the commission for the time in question.

The rent so paid the appellants throughout the whole time was received and receipted for by them, without protest, as in full payment for this part of the building.

The appellants claimed and complained throughout the whole time that they were not receiving enough rent for the building, claiming that the whole building was worth $6,000, and at one time threatening to demand possession if this amount was not appropriated and paid them for the *entire building*, which, however, was never done by them. They now claim additional rent for this part of the building above the basement substantially upon the theory that it was worth more than they received for it, and that their complaints and threats to demand possession if the rent was not increased by Congress, constituted such a demand for possession as would change the status of the Government for the three years and one month's occupation not expressly covered by the written leases, from that of a hold-over tenant under the terms of the prior written leases, to that of a tenant under an implied contract to pay whatever the property was worth.

THE GOVERNMENT'S DEFENSES.

The Government contends that the occupation and use of the basement was not only without authority on the part of the government officers responsible therefor, but further, under the circumstances, was in effect prohibited by law, and was therefore a tort on the part of such officers, for which the Government is not liable.

On that part of the claim which is for additional rent for the remaining, or main portion of the building, there can be no recovery, for the reason that this occupation and use by the Government was governed and controlled by the terms of the express written leases between the parties, by which the rate of rent was fixed; that the appellants were paid rent for the time in question at the rate of rent so fixed; and that they received and receipted therefor, without protest, as in full payment of rent for that part of the building.

CLAIM OF RENT FOR BASEMENT.

In the court below, this part of the claim was based and prosecuted upon the theory of an implied contract (Rec., p. 11), while in the prosecution of the case here the idea of an implied contract is expressly repudiated by counsel for appellants (pp. 23–24, appellant's brief).

Of course, with the statute providing that the sums annually appropriated and which were paid appellants for rent for quarters for the commission should be in full for that purpose, there could be no

contract, either express or implied, for the payment of a greater amount for quarters for the commission.

As above indicated, appellants now admit the correctness of this contention and defense of the Government in the court below; and they now take the position that there is a right of recovery under the provision of the fifth amendment of the Constitution that private property shall not be taken for public use without just compensation, regardless of whether the occupation and use were under such circumstances as would give rise to an implied contract, and apparently also regardless of whether such occupation and use were or were not by or under competent authority on the part of the government officers or agents responsible therefor.

We contend that the temporary use and occupation of property such as the use of the basement of the building in question in this case does not come within the intent and meaning of the taking of property as contemplated by the fifth amendment. The taking referred to in the Constitution for which compensation must be made must be an absolute taking and appropriation, not a mere temporary occupation and use.

Occupation and use of basement a tort, for which no right of recovery.

But even if such temporary occupation and use be held to be within the contemplation of the provision of the fifth amendment in question, the occupation

and use here was clearly and conclusively a tort, for which there can be no right of recovery against the Government.

Such occupation and use was a tort for the reason that it not only was without any authority on the part of the government officers or agents responsible for it, but was also substantially in direct violation of law, as a consideration of the statutes bearing upon the question will show.

The first provision of law relative to the providing of quarters for the Civil Service Commission was the act of January 16, 1883, creating the commission (22 Stat. L., 403), section 4 of which provided:

> That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied and the necessary printing to be done for said commission.

Counsel for appellants lay much stress upon this provision of the act of 1883, claiming that under it the government officers were authorized to take and use, and therefore to bind the Government to pay for, whatever quarters they might think necessary. But, contrary to the statement of counsel for appellants (p. 10, appellants' brief), the authority of the Secretary of the Interior under the above-quoted

general provisions of the act of January 16, 1883, was qualified not only by certain other general statutes necessary to be considered in arriving at the proper construction to be placed upon said provision, but also by the subsequent annual appropriation acts making the appropriations for rent for quarters for the commission during the time in question in this suit.

At the time of the passage of said act of 1883 there were in force and effect the following general statutes, which must be considered in construing the above-quoted provision of said act and which clearly limited the power and authority of the Secretary of the Interior in the premises:

Section 3679, Revised Statutes:

> No department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year or involve the Government in any contract for the future payment of money in excess of such appropriations.

Section 3732, Revised Statutes:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

Act of June 22, 1874 (18 Stat. L., 144):

> And hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall be made in terms by Congress.

Act of March 3, 1877 (19 Stat. L., 370):

> And hereafter no contract shall be made for the rent of any building or part of any building to be used for the purpose of the Government in the District of Columbia until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building.

But outside of the above *prior* statutes, we have the general power and authority conferred upon the Secretary of the Interior by said provision of the act of 1883 conclusively qualified and limited by a provision in each of the appropriation acts covering the time for which rent is claimed, specifically restricting the Secretary's power to within the amounts therein appropriated for rent for quarters for the commission.

The introductory paragraph of each of the appropriation acts in question specifically provided that the sums therein appropriated should be *in full compensation* for the objects and purposes for which they were appropriated, the language of the provision being as follows:

> That the following sums be, and the same are hereby, appropriated out of any money

> in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year * * * for the objects hereinafter expressed. (31 Stats. L., 86, 960; 32 id., 120, 854; 33 id., 85, 631.)

And further, the last section of each of these appropriation acts specifically provides that all laws or parts of laws inconsistent with the act are repealed (31 Stats. L., 134, 1009; 32 id., 171, 906; 33 id., 142, 688); hence if there had been any prior provision of law which might otherwise have seemed to allow the Secretary of the Interior power to exceed the amounts appropriated for rent of quarters for the commission, notwithstanding the above-quoted provision as to the amounts appropriated being *in full compensation*, this repealing clause in each of said acts would have the effect of repealing any such prior provision of law, thus leaving said provision as to *compensation in full* in full force and effect.

It is therefore clear that the Secretary of the Interior, in providing quarters for the commission, was restricted by law to the amounts of the annual appropriations therefor, and that he was absolutely without authority or power to rent, or to take and use, any quarters for the commission which would involve the Government for the payment of any amount of rent in excess of the amounts so appropriated.

We have so far discussed this case as though the occupation and use of the basement of the building had been authorized by the Secretary of the Interior, who was the only officer or agent of the Government

having any power or authority under the statutes to provide quarters for the commission. But it appears from the record (p. 12) that the occupation and use was never authorized or directed by him (Rec., pp. 8, 12), but was solely by his subordinate officers of the department, the officers of the Civil Service Commission, who at no time had any authority whatever to provide quarters for the commission. The record shows that the Secretary, recognizing the limitation of his authority in the premises to the amounts appropriated, refused the requests made by the appellants that the basement be rented for the use of the commission. (Finding IV, Rec., p. 8.)

It thus appears that the occupation and use of the basement was doubly without authority. But even if such occupation and use had been under the direction of the Secretary himself, the result would be the same, since, as above shown, he had no authority whatever to authorize the taking and using of any quarters for the commission in addition to those for which the full amounts of the appropriations were being paid.

GOVERNMENT NOT LIABLE FOR UNAUTHORIZED ACTS OF ITS OFFICERS OR AGENTS.

It would seem to be too well established by the decisions of this court to admit of reasonable controversy, that the Government is not liable to individuals for the misfeasance or unauthorized exercise of power by its officers and agents; that it is bound only by such of their acts as come within the just exer-

cise of their official powers, and is not bound, nor liable for, such of their acts as are beyond their authority; that individuals, as well as the courts, must take notice of the extent of the authority of such public agents; and that wrongs or injuries resulting from unauthorized acts or exercises of power by them are torts, for which there can be no recovery.

In *Bank of United States* v. *Owens* (2 Pet., 527, 539), this court said:

> Courts are instituted to carry into effect the laws of the country. How can they then become auxiliary to the consummation of violations of law? To enumerate here all the instances in which this reasoning has been practically applied would be to incur the imputation of vain parade. There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.

In the case of *Johnson* v. *United States* (5 Mason, 441), Mr. Justice Story said:

> I hold it most clear that the acts of a public officer beyond the scope of his power and in violation of his public duties are, in such cases at least, utterly void. A different doctrine would lead to the most alarming and mischievous consequences and unsettle some of the best established principles of agency.

In the case of *Hunter* v. *The United States* (5 Pet., 173, 187) this court said:

> If in violation of his duty an officer shall knowingly, or even corruptly, do an act injurious to the public, can it be considered

obligatory? He can only bind the Government by acts which come within a just exercise of his official power.

In *Gibbons* v. *United States* (8 Wall., 269, 274), which was an appeal from the Court of Claims on an action brought to recover money alleged to have been wrongfully exacted by a quartermaster of the United States in the execution of a contract for the delivery of quartermaster supplies, the court said:

> But it is not to be disguised that this is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests. * * *" The language of the statutes which conferred jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of

> official duties. * * * These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting in the Court of Claims of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government and in the belief that it was for its interest.

In *Filor* v. *The United States* (9 Wall., 45, 48) suit was brought in the Court of Claims to recover rent for property occupied and used by the Quartermaster's Department of the Army at Key West, Fla., under a lease made by the acting assistant quartermaster by direction of the military commander at that station, and which lease had not been approved by the Quartermaster-General of the Army. And here it is to be noted that this case was very similar to the case at bar though much stronger against the Government, since there *was authority*, there, in the responsible officer of the Government, the Quartermaster-General, for the leasing of such quarters, while here there was no authority in the Secretary of the Interior or any other government officer for the leasing or occupation and use of the basement in question. In delivering the opinion of this court, affirming the judgment of the Court of Claims dismissing the claimant's petition, Mr. Justice Field said:

> We do not find in any regulation of the army or in any act of Congress that the acting assistant quartermaster at Key West was

> invested with power to bind the United States to the agreement or lease produced, even though his action was taken by direction of the military commander at that station and the instrument was approved by him. No lease of premises for the use of the Quartermaster's Department, or any branch of it, could be binding upon the Government until approved by the Quartermaster-General. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the Government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the Government is concerned, the work of strangers.

In *Whiteside* v. *The United States* (93 U. S., 247, 256–257) the case turned on this question of whether or not the Government was liable for the unauthorized acts of its agents, and in the course of its opinion deciding the question in the negative this court said:

> Different rules prevail in respect to the act and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appear that the agent was acting within the scope of his

> authority, or that he had been held out as having authority to do the act or was employed in his capacity as a public agent to do the act or make the declaration for the Government. Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public.
>
> Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

Of like effect are the decisions of this court in the cases of *Hart* v. *United States* (95 U. S., 316, 318); *Hawkins* v. *United States* (96 U. S., 689, 691); *Langford* v. *United States* (101 U. S., 341); *Moffatt* v. *United States* (112 U. S., 24, 31); *Camp* v. *U. S.* (113 U. S., 648, 653); *German Bank* v. *United States* (148 U. S., 573, 579).

In *Hume* v. *United States* (132 U. S., 406, 414), in which this question was involved, Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

> In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the

> rule requires all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the Government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal.

While the decisions of the court in the cases so far cited by us were based on the law as it stood prior to the passage of the act of March 3, 1887 (24 Stat. L., 505), by which the Court of Claims was for the first time expressly given jurisdiction of claims against the Government "founded upon the Constitution;" yet since the passage of this act, the principle in question; that is, that the Government is not liable for the tortious acts of its officers or agents, has been held to apply, and to bar a recovery, the same in cases *founded upon the Constitution*, as in cases based upon implied contract, independent of the Constitution.

In the case of *Hill* v. *United States* (149 U. S., 593, 597–598) suit was brought to recover for the occupation and use by the United States, for light-house purposes, of certain property claimed by the plaintiff, *the suit being specifically based upon this provision of the fifth amendment of the Constitution that private property should not be taken by the United States for public use without just compensation.* The case was remanded to the court below for dismissal for want of jurisdiction; and in delivering the opinion of this court Mr. Justice Gray said:

> The whole effect of the act of March 3, 1887 (c. 359), under which this suit was brought,

was to give the Circuit and District Courts of the United States jurisdiction, concurrently with the Court of Claims, of suits to recover damages against the United States, in cases not sounding in tort. (*United States* v. *Jones*, 131 U. S., 1, 16, 18.)

The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the law as upon an implied contract. (*Gibbons* v. *United States*, 8 Wall., 269, 274; *Langford* v. *United States*, 101 U. S., 341, 346; *United States* v. *Jones*, above cited.)

An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. (*Lloyd* v. *Hough*, 1 How., 153, 159; *Carpenter* v. *United States*, 17 Wall., 489, 493.)

And in *Schillinger* v. *United States* (155 U. S., 163), it is so clearly and conclusively settled by the opinion of this court that the provision of the act of March 3, 1887, giving the Court of Claims jurisdiction of claims founded upon the Constitution creates no liability or right of recovery where the claim is based upon a tortious act of a government officer or agent, as to leave absolutely no room for the appellant's contention.

In the Schillinger case, which was on appeal from the Court of Claims, claim was made *under the fifth amendment* for compensation for the alleged use of Schillinger's patent, which had been neither authorized, admitted, nor recognized by the government officers; and in delivering the opinion of the court, affirming the decision of the Court of Claims dismissing the claimant's petition, Mr. Justice Brewer, after citing the different statutes conferring the jurisdiction of the Court of Claims, including the said act of March 3, 1887, said (p. 167):

> Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the Government for mere torts; some element of contractural liability must lie at the foundation of every action. In *Gibbons* v. *United States* (8 Wall., 269, 275) it was said: "The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." And again, in *Morgan* v. *United States* (14 Wall., 531, 534): "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the Government."

The rule thus laid down has been consistently followed by this court in many cases up to and including the recent case of *Hill* v. *United States* (149 U. S., 593, 598).

If there was any error in this interpretation, first announced in 1888, of the scope of the act, and if it was the intent of Congress to grant to the court jurisdiction over actions against the Government for torts, an amending statute of but a few words would have corrected the error and removed all doubt. While the language of the act of 1887 is broader than that of 1855, it is equally clear in withholding such jurisdiction. It added, "all claims founded upon the Constitution of the United States," but that does not include claims founded upon torts, any more than "all claims founded upon any law of Congress" found in the prior act. The identity of the descriptive words excludes the thought of any change.

It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use

> without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

And again, in *Bigby* v. *United States* (188 U. S., 400, 407), Mr. Justice Harlan, after a clear and comprehensive discussion of the leading cases on this question, in delivering the opinion of the court, said:

> It thus appears that the court has steadily adhered to the general rule that, without its consent in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasance, or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

And after referring to certain cases in which the court sustained the right of recovery against the Government, among which were the cases of *United States* v. *Russell* (13 Wall., 623) and *United States* v. *Great Falls Company* (112 U. S., 645), which are cited and strongly relied upon by counsel for appellants to establish a right of recovery in the case at bar,

Mr. Justice Harlan strikes the keynote and makes clear the essential fact necessary to sustain a right of recovery when he says (p. 408):

> The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so.

And so in the *Lynah case* (188 U. S., 445), and in all other cases cited by counsel for claimant in which a right of recovery was sustained against the Government, there was this important and necessary fact of the action of the government officers in the premises being supported by proper authority and power on their part.

And this is the point on which the case at bar turns. There was no power or authority either in the officers of the Civil Service Commission or in the Secretary of the Interior to appropriate the appellant's basement for occupation and use by the Civil Service Commission; and of this fact the appellants were fully informed, though it is immaterial whether they did or did not have actual knowledge of the fact, since it was a matter of law, as to which their knowledge is presumed.

And here we wish to call especial attention to the fact that the appellants were in no wise misled in the matter as to a right to compensation for the use of the basement of the building, since, as stated by Judge Barney in delivering the opinion of the Court of Claims (Rec., p. 13):

> The facts in the present case show that the claimants had actual as well as presumptive

> notice of the extent of the authority of the Secretary of the Interior to enter into a contract for rent for the Civil Service Commission; for during the whole period they persistently complained of the small amount which Congress was appropriating for that purpose.
>
> In fact, the opening paragraph of each of the written leases in this case shows a recognition by all parties of the source of authority to contract for rent for the Civil Service Commission. * * *

This recognition was evidenced by citing as authority to contract for rent the act of Congress making the appropriation for the respective years in question.

As further evidence on this point we have the additional facts of the withholding of the basement from the lease, the occupation of it by the commission without any contract therefor, the action on the part both of the Secretary of the Interior and of appellants in trying to induce Congress to appropriate a greater amount for rent of quarters for the commission, so that the basement could be rented, together with the refusal of Congress to sufficiently increase the appropriation for the purpose in question. The claimants knew the amount of the appropriation for each year, that it was all being expended under the terms of their lease with the Government for the *main* part of the building, and that therefore neither the officers of the commission nor the Secretary of the Interior could legally contract or bind

the Government to pay rent for the basement of the building.

A decision sustaining the appellants' demand for recovery would place any executive officer of the Government above Congress and the law in the important function of the expenditure of governmental funds for public purposes.

As stated by Judge Barney, in the opinion of the court below:

> Under the Constitution Congress holds the purse strings of the Government, and we do not think that by evasion or indirection any officer of the Government can deprive that body of this important privilege. Mr. Justice Story, in his Commentaries on the Constitution, in discussing this privilege of Congress, said: "The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation." (2 Story Com., sec. 1348.)
>
> To hold that the Civil Service Commission can take possession of the whole of a building, a part of which has been rented for its use pursuant to an act of Congress, and make the Government liable for this additional expense, would be equivalent to saying that Congress is powerless in limiting the expenses of the Government. Under such a holding, the Civil Service Commission might have "swarmed" into possession of the whole block in which

> they were located and involved the Government in payment for the rent of the same. Such a ruling would place the Treasury of the Government at the mercy and convenience of every one of its officers. We have been cited to no authority sustaining such a conclusion, and do not believe it to be the law.

A construction of law and judgment in favor of the appellants on this part of the claim would, as the court will readily perceive, mean the opening up of an easy avenue for endless collusion, conspiracy, and fraud against the Government, not only in this particular line, but also in other lines of the expenditure of public moneys. Hence, if there were no other defense, the petition should be dismissed on the ground that a construction of the law and judgment in favor of the appellants would be most decidedly and dangerously against public policy. (Page on Contracts, sec. 326; *Randall* v. *Howard*, 2 Black., 585; *Hannay* v. *Eve*, 3 Cr., 242; *Woodstock Iron Co.* v. *Exten. Co.*, 129 U. S., 643; *Gibbs* v. *Gas Co.*, 130 U. S., 408.)

We have deemed it necessary to consider the authorities somewhat at length by reason of the earnest and insistent position taken by counsel for appellants in urging the contrary view of the case, though as we construe the law and the decisions of the courts the appellants are clearly and conclusively without any right of recovery on this claim for occupation and use of the basement of the building.

CLAIM FOR ADDITIONAL RENT OF BUILDING ABOVE BASEMENT.

Claim is made for additional rent for the main part of the building—that is, all of the building above the basement—the amount of the claim being $1,500, according to the allegations of the petition, though increased here to nearly three times this amount. No recovery, however, can be had on this item of the claim, for the following reasons:

First. The amount of rent that could be paid for quarters for the commission was fixed and *expressly limited* by law to the amount which the appellants were paid for this part of their building.

Second. The appellants received the payment of this amount of rent for the full time in question, and receipted for the same, without protest, *as in full* of their account for rent therefor.

Third. The occupation of this part of the building each year of the five years' time in question was either directly under a formal written contract which specified the rental rate, or was a "hold-over" occupation under the terms of such a prior written contract, and the claimants have been paid the full amount of rent due at the rate specified in such contracts.

Time expressly covered by written contracts.

The five-year occupation in question may be divided into two classes, viz, that which *was*, and that which was *not*, expressly covered by the written contracts.

The occupation *expressly* covered by the contracts consists of the eleven months from August 1, 1900, to July 1, 1901, covered by the contract of July 10, 1900, and the one year from July 1, 1903, to July 1, 1904, covered by the contract of August 18, 1903, making a total of one year and eleven months.

The occupation *not* expressly covered by the contracts consists of the two fiscal years from July 1, 1901, to July 1, 1903, immediately following the eleven months' occupation covered by the contract of July 10, 1900, and the one year and one month from July 1, 1904, to August 1, 1905, immediately following the one year's occupation covered by the contract of August 18, 1903, which makes a total of three years and one month not *expressly* covered by the written contracts.

Notwithstanding the suggestion of counsel for appellants to the contrary (pp. 37, 39, appellants' brief), it is so clear and conclusive that no recovery can be had for additional rent on account of the one year and eleven months expressly covered by the two written contracts as to need no supporting argument, since the contracts themselves specified the rate of rent to be paid, and the claimants have been paid and have receipted for the rent *as in full*, at the rate specified in the contracts.

Time not expressly covered by the contracts.

The contention of counsel for appellants as regards this claim for additional rent for the main part of the building would seem to be that this occupancy

of three years and one month not *expressly* covered by the written contracts was not under the terms of any agreement whatever as to rate of rental; that such occupancy therefore created an implied contract for the payment by the Government of a fair rental rate; and that the rent paid by the Government for this period of three years and one month was less, by the amount claimed, than the fair rental value of the property.

As already stated, there can be no recovery of additional rent for the time in question for three reasons, either of which is a complete defense against recovery, and which we will now consider.

Implied obligation for additional rent could not arise.

The same defense presented by us against the claim of rent for the basement of the building applies with equal force against this claim for additional rent for this part of the building above the basement—that is, that the rate of rent that could be paid for quarters for the commission being expressly limited by law to the amounts appropriated by Congress and paid the appellants, no implied obligation could arise, *in the ace of this express prohibition of the statutes,* to pay a greater amount than was provided by the appropriations for rent for the commission.

Receipt in full, without protest.

For this part of the building the appellants received full payment of rent at the rate specified in the express contracts, and they receipted for the same *as in full payment,* without protest (Finding VI, Rec. p.

9, also p. 11 id.); and as such receipt of payment, without protest, is conclusive against a claim for additional pay, there can be no recovery of additional rent even if it should be held that the tenancy was under implied contract, entirely independent of the express contracts, instead of a hold-over tenancy, under the terms and conditions of the preceding express contracts. (*United States* v. *Childs*, 12 Wall., 232; *Francis* v. *United States*, 96 U. S., 354, 359–360; *Murphy* v. *United States*, 104 U. S., 464; *De Arnaud* v. *United States*, 151 U. S., 483; *Garlinger* v. *United States*, 169 U. S. 316, 322–323; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark*, 178 U. S., 353, 368–369; *Newman* v. *United States*, 81 Fed. Rep., 122.)

In the *De Arnaud case* (*supra*), this court, in discussing the effect of a receipt in full, said:

> In the absence of allegation and evidence that this receipt was given in ignorance of its purport, or any circumstances constituting duress, it must be regarded as a quittance in bar of any demand.

In the *Garlinger case* the court held the claimant concluded merely upon his acceptance of the payments made him, without his having receipted for the same as in full payment. In the course of its opinion the court said:

> We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of

> time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received with the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.
>
> These views sufficiently dispose of the case, and render it unnecessary to consider the other contentions urged on behalf of the Government.

As to the cases of *Fire Insurance Association* v. *Wickham* (141 U. S., 564), *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark* (178 U. S., 353), and *City of San Juan* v. *St. Johns Gas Co.* (195 U. S., 510), cited by counsel (pp. 35–36, appellants' brief), as against such receipts in full being held conclusive, these decisions do not support the appellants' contention on this point.

Referring to the statement in the quotation by counsel from the opinion in the first of these cases, that the rule is well established that where the facts show *a certain sum to be due* part payment of that sum will not release the debtor for the whole debt, we will say that this rule does not apply here, for the reason that in the case at bar no *certain sum* greater than the amount of rent paid the appellants is shown *to have been due.*

And again, as to the statement in the opinion to the effect that where there is a dispute as to the

amount due, the payment of a smaller amount than the amount claimed, *in the way of a compromise* would be conclusive; but that where the larger sum *is admitted to be due*, or where the circumstances of the case show that there is no good reason to doubt that it is due, the payment of a less amount would not be conclusive. This part of the opinion can have no application here, for the reason that no "larger sum" is or was ever *admitted to be due*, notwithstanding the statement of counsel for appellants to the contrary (p. 36, appellants' brief). The findings of fact do not, nor did the evidence in this case, show any admission on the part of the Government or any of its officers that any greater amount was due for rent for this part of the building than that which was paid the appellants for it. And, further, the appellants never claimed, during the time in question, that any greater amount was *due* than was paid them, though they *did* claim that it was *worth*, and that they *ought to have*, more than they were receiving for it.

Of course there was no compromise, as counsel for appellants say, and for this very reason, that the appellants never during the time, or at any time of the occupation and payment of the rent, claimed any more rent *to be due* than was paid them.

As to the second of these cases cited by counsel for claimant, *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Clark* (178 U. S., 353), both the opinion in this case and the authorities therein cited conclusively support our contention here on the facts in the case at

bar instead of the appellants' contention. In that case Mr. Chief Justice Fuller, after a clear and concise discussion of the authorities on the subject, said (pp. 368–369):

> Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as a quittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. (*De Arnaud* v. *United States*, 151 U. S., 483; *United States* v. *Garlinger*, 169 U. S., 316, 322; *United States* v. *Adams*, 7 Wall., 463; *United States* v. *Child*, 12 Wall., 232; *United States* v. *Justice*, 14 Wall., 535; *Baker* v. *Nachtrieb*, 19 How., 126.)

In the case at bar there is a total absence of any allegation or evidence of these receipts in full having been given by the appellants either *in ignorance of their purport*, or *in circumstances constituting duress, fraud, or mistake*, hence there is no ground upon which to base a denial of their conclusiveness as a final settlement.

We submit that this defense of receipt of payment *as in full*, under the circumstances in this case, constitutes a complete defense and bar to any recovery whatever on this item of additional rent for the main part of the building.

Government a hold-over tenant under terms of express contracts, and appellants paid in accordance therewith.

The position of the Government is that during the three years and one month's tenancy not expressly covered by the two written leases between the parties, the Government was a hold-over tenant under the terms of the written leases for preceding years, which leases determined the rate of rent to be paid during such hold-over tenancy, and at which rate the appellants have been paid rent for the time in question. The facts in this connection are, in brief, substantially as follows (Findings III and IV, Rec., pp. 7–9):

Upon the expiration of the first written lease, that of July 10, 1900, for the last eleven months of the fiscal year ending June 30, 1901, the Civil Service Commission continued in possession and use of the building, and the Secretary of the Interior a short time thereafter wrote the appellants proposing a renewal of said lease for the then fiscal year ending June 30, 1902, the appropriation by Congress for that year being the same as for the preceding year; that is, $4,000. The appellants replied that they were unwilling to *bind* themselves to rent the building for *another year* at the rate of $4,000, and that they could not with justice to themselves rent the *entire building*, including the basement, for less than $6,000; and no further action was taken by either party for that year, rent being paid at the rate specified in the

lease for the preceding year, which was the full amount of the appropriation.

For the fiscal year ending June 30, 1903, the Secretary of the Interior recommended to Congress an increase to $6,000 for rent for the commission, and appellants' agent informed both the Secretary and Congress that if this amount was not provided for rent for the *entire building*, possession would be demanded. Congress, however, refused to increase the appropriation, and no further action was taken by either party as to increase of rent or termination of the tenancy, the occupancy of the commission being continued throughout the year, and rent being paid therefor at the same rate as for the preceding years; that is, at the rate of the $4,000 appropriated and limited by Congress.

For the fiscal year ending June 30, 1904, the Secretary of the Interior renewed his recommendation for an increase to $6,000, and for this year Congress increased the appropriation to $4,500, and the Secretary wrote the appellants proposing renting the *entire building* for the $4,500 provided by the appropriation, which, however, the appellants refused to do, and a written lease was again entered into for all the building *excepi the basement* for that fiscal year, at the rate of the $4,500 appropriated, which rate of rental was paid the appellants.

When the period covered by the above-noted lease expired, on June 30, 1904, the commission continued in the possession and use of the building without any further action on the part of either party until

November 15, 1904, when the Secretary of the Interior wrote the appellants proposing for that fiscal year an express renewal of the preceding year's lease for the $4,500 which had again been appropriated by Congress. The appellants took no action in response to this proposal further than to write the Secretary requesting that the basement be included in the lease at a rental rate of 30 cents per square foot of its floor space, to which suggestion the Secretary made no response, and no further action was taken in the matter, the occupation continuing throughout the year and rent being paid therefor at the rate of the $4,500 provided and limited by the appropriation, and specified in the written lease for the preceding year.

The appropriation for the next fiscal year was again $4,500 and the commission, without any express renewal of the preceding lease, or further action by either party, continued in the possession and use of the building for the month up to August 1, 1905, for which appellants were paid rent at the rate of $4,500 provided by the appropriation and by the preceding lease.

It is well settled that where a tenant holds over after the expiration of a written contract, or lease, the law implies that he holds over subject to and upon the terms of such lease, and that the rights of the parties are controlled by the contract under which the entry was made. As stated in the opinion of the court below, "It is elementary that where the landlord suffers the tenant to remain in possession

after the expiration of his lease the law presumes the holding to be upon the same terms as the written lease under which the entry was made." (Taylor's Landlord and Tenant, sec. 525; Jones on Landlord and Tenant, secs., 201, 555; American and English Encyclopedia of Law, 2d Ed., vol. 18, p. 407; *Dermott* v. *Tucker*, 3 Cranch, C. C., 92; *Baker* v. *Root*, 4 McLean, U. S., 572; *Hall* v. *Myers*, 43 Md., 446; *Hobbs* v. *Batory*, 86 Md., 68; *Lovett* v. *United States*, 12 Ct. Cls. 67, 84; *Salisbury* v. *Hale*, 12 Pick., 332.)

Therefore, when the Government continued its occupancy after the expiration, on June 30, 1901, of the eleven months' lease of July 10, 1900, under which entry was made, it became a hold-over tenant under the terms of this lease for the preceding year, and so continued for the succeeding two years, up to July 1, 1903, the beginning of the fiscal year covered by the new written lease of August 18, 1903, for and during which two years the rate of rental was fixed and governed by the terms of the original lease of July 10, 1900, under which the entry was made.

And, likewise, when the Government's occupancy continued after the expiration, on July 1, 1904, of the one year's occupancy under the new lease of August 18, 1903, by which the annual rental rate was increased from $4,000 to $4,500 in accordance with the increase of the annual appropriation for quarters for the commission, the Government again became a hold-over tenant subject to and upon the terms of this new written lease, and so continued during the

remaining one year and one month of the time in question.

Nothing could have put the Government in any other position than that of a hold-over tenant under the terms and conditions of these express contracts of lease except a legal demand for possession, or notice to quit, and no such demand or notice was ever served or made on the Government.

There is an attempt in behalf of appellants to make it appear that such a demand was made on the Government, but the record absolutely fails to sustain any such contention.

The record *does* show that the appellants resorted to all available means of securing an increase of rent for the building—including *threats to demand possession* if Congress did not increase the rent—but it also shows clearly that they nevertheless wanted to keep the Government as a tenant, even if they could not secure an increase of rent, and that their action always stopped short of a notice to quit or demand for possession.

The facts relied upon by the appellants to sustain this contention that the three years and one month's occupation not *expressly* covered by the two written contracts of lease are apparently as follows:

First, that the appellants claimed and urged that the entire building was worth $6,000 per year, and that the Government ought to pay them that amount of rent for it. However, this fact does not savor in the least of any demand for possession.

Second, that when the Secretary of the Interior, shortly after the expiration of the time covered by the first written lease, wrote the appellants proposing a renewal of said lease for the then succeeding fiscal year, they wrote him in reply that they were unwilling to bind themselves to rent the building "for another year" at the rate of $4,000 per annum, and that they could not, with justice to themselves, rent the entire building, including the basement, at a rental of less than $6,000 per annum. This fact, however, utterly fails to show any demand for possession, the appellants merely stating that they were unwilling to *bind* themselves to rent the building, exclusive of the basement, for *another year* at the rate of the $4,000 they had been receiving for it, and which was the amount appropriated by Congress for that year. This clearly meant nothing more than that while they were not satisfied with the rate of rent they were receiving, yet they were willing to allow the Government to remain at the old rate rather than to lose it as a tenant, though they were not willing to enter into a renewal of the lease *for the full year*. They evidently thought this course might aid in inducing Congress to increase the rent, and also this would leave it open to them to terminate the tenancy on thirty days' notice in case an opportunity should present itself for renting the *entire building* and at a better rate of rental. (*Spalding* v. *Hall*, 6 D. C., 123; District of Columbia Code of 1902, secs. 1034, 1221.) In no view of the case can this letter be construed as a demand for possession. And further, it is to be noted that this correspondence

between the Secretary and the appellants took place some time after the beginning of the fiscal year, so that the Government was then, and had been for some time, a hold-over tenant under the terms of the written lease for the preceding year.

Third, that upon the failure of the House of Representatives to increase the appropriation for rent of quarters for the commission for the fiscal year ending June 30, 1903, to $6,000, as recommended by the Secretary of the Interior, the agent of the appellants informed the chief clerk of the department, the United States Senate, and the Committee on Appropriations of the House of Representatives *that unless this estimate or recommendation of $6,000 by the Secretary of the Interior was restored by the Senate he was instructed by the appellants to ask for possession of said property at the earliest convenient time,* and that possession *would be demanded unless an appropriation of $6,000 was made for rental of the entire building.* It is perfectly clear, however, that in all this there was in no sense a demand for possession, as this action by appellants' agent did nothing more than merely convey the information that he had been instructed to ask for possession *at the earliest convenience* of the Civil Service Commission, *in case Congress should not finally make an appropriation of $6,000 for the entire building.* That a statement of what the appellants *intended* to do *if Congress did not increase the rent* constitutes a notice to quit, or demand for possession, is such a groundless proposition that it calls for no argument in refutation.

Fourth, on November 15, 1904, following the expiration of the second written lease, covering the fiscal year ending June 30, 1904, the Secretary of the Interior wrote the appellants proposing a renewal of said lease for the then fiscal year, ending June 30, 1905, at the rate of $4,500 per annum appropriated by Congress, and upon this proposal appellants took no action further than to write the Secretary requesting that the basement of the building be included in the lease at a rate of 30 cents per square foot of its floor space. This action on the part of appellants is so devoid of even a suggestion of a demand for possession that it calls for no discussion. And here, again, we have the fact that at the time of this correspondence between the Secretary of the Interior and the appellants, the status of the Government as a hold-over tenant under the terms of the prior lease had been fixed by a hold-over occupancy of more than four months, without any objection or protest on the part of the appellants.

To be a legal and sufficient notice to quit, a notice must be explicit and positive in terms, it must specify the time for the tenant to quit, and it must be such that the tenant may safely act on it at the time of receiving it; and it is therefore clear that at no time during the entire period of the occupancy involved in this claim was there any demand for possession or notice to vacate. But if there had been, it would make no difference, for the reason that the appellants' acceptance of the rent due, at the end of each

year of the occupancy, would constitute a waiver of any such demand or notice. (Jones on Landlord and Tenant, sec. 271; *Collins* v. *Canty*, 6 Cush., Mass., 415; *Murphy* v. *Little*, 69 Vt., 261.)

True, there might be circumstances where the rate of rent would be increased by the action of the parties, though the tenancy was a hold-over tenancy in accordance with all of the other provisions of the preceding express contract; but such was not the case here, for while it is held by some authorities that a notice to a tenant before the termination of the lease that he must pay an increased rent if he holds over is usually accepted—that is, the increased rent is agreed to—by the tenant's continuance in possession or by his mere silence; yet, on the other hand, if the tenant *manifests his dissent* to the landlord's proposed increase of rent, then no privity of contract will be created for the increased rent, and the hold-over tenancy will be considered to be at the rate of rent specified in the lease under which he previously held possession. The rent can not be increased except by consent of the tenant either express or implied. In such case the landlord's remedy would be to oust the tenant from possession. (Jones on Landlord and Tenant, sec. 267; *Hunt* v. *Bailey*, 39 Mo., 267; *Galloway* v. *Kerby*, 9 Ill., App., 501; *Atkinson* v. *Cole*, 16 Colo., 83.)

As to the case of *Semmes and Barber* v. *United States*, 26 Cls. 119 cited and strongly relied upon by counsel (pp. 18–21, appellants' brief), the case is not in

the least in point here, as there are the following important and controlling differences between the facts there and here.

In that case there was not, as here, an express limitation by law of the amount that could be paid for the property, to the amount that was paid by the government officers for it.

There the question of receipt in full did not enter into the case, as it does here.

And, finally, in that case the Government was given notice to quit at a specified future date unless it was willing to pay the increased rate of rent demanded, while in the case at bar no such demand or notice to quit, was given, though numerous complaints and a *threat* to demand possession were made by the appellants. And so, if there had been here, as there, no statutory limitation of the amount of rent that could be paid, and also such a demand, or notice that increased rent must be paid if the Government held over or continued in possession, it might have been sufficient to have made the Government liable for the increase so demanded.

However, in the case at bar there was no such notice, or intimation of any kind, from the appellants to the Government *either before or after the expiration of the respective written leases* that additional rent would be required for that part of the building covered by the leases if the Government continued in possession. But if there *had* been such notice, there was not only no acquiescence or agreement, either express or implied, on the part of the Gov-

ernment, for an increase of the rent over the contract rates, but there was, on the other hand, *express dissent by the Government*, speaking through its principal agent, Congress, in the refusal of Congress to appropriate for the increases proposed and recommended to Congress by the Secretary of the Interior and urged upon Congress by the appellants.

And, further, if there *had* been any such notice, the subsequent acceptance by the appellants, *as in full payment*, of the amount of money appropriated for each year, would constitute a waiver of the notice. (Jones on Landlord and Tenant, secs. 204, 271; *Collins* v. *Canty*, 6 Cush., Mass., 415.)

As a matter of fact, none of the objections made by the appellants were really against the amount of rent paid for *this* part of the building—that is, that part above the basement, and which was covered by the leases—but were against the use of the basement along with it for less tnan $6,000 for the *entire building;* hence the objections were really against the use of the *basement* without additional compensation, and have no bearing upon this item of additional rent for the building *above the* basement.

In the concise and forcible language of the opinion of the court below (Rec., p. 11):

> It is evident that during such part of the period of five years extending from August 1, 1900, to August 1, 1905, as the Government occupied the building without any written lease, it was as a tenant holding over after the expiration of the formal written leases. The

alleged demands for possession on the part of the claimants were nothing more than threats for the purpose of securing a higher rental, and never ripened into a denial of the relation of landlord and tenant. This conclusion is made positive by the fact that during the whole period the claimants receipted in full for the rent received, exclusive of the basement, without any protest, except continuous complaint that they were not getting enough rent for the building. It hardly seems necessary to quote or even cite authorities to show that the complaints and threats of the claimants did not amount to a notice to quit. (Taylor's Landlord and Tenant, sec. 483, and cases cited.)

We submit that the record shows that during the three years and one month in question, not expressly covered by the contracts of lease, the Government was a hold-over tenant under the terms of said contracts; and that as the rent has been fully paid the appellants at the rate specified in said contracts, there can therefore be no recovery of additional rent.

We think the Government's defense to both items of the claim is conclusive, and therefore respectfully ask that the judgment of the court below be affirmed.

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